FILED BY CLERK
DEC 24 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. FRANK MIGUEL LEON, Petitioner.	2 CA-CR 2008-0245-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044051

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Judge.

¶1 Pursuant to a plea agreement, petitioner Frank Leon was convicted of one count each of negligent homicide and leaving the scene of an accident involving death or serious physical injury. The trial court sentenced him to consecutive, presumptive prison terms of six years and 3.5 years, respectively.

¶2 Leon subsequently filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing his counsel had been ineffective in failing to inform the court that the presentence report erroneously identified a prior misdemeanor conviction as a felony. Consequently, he argued, the court erred in considering this conviction as a felony when weighing aggravating and mitigating factors at sentencing.[1] He therefore requested a new sentencing hearing "to redetermine the sentence properly to be imposed on the underlying convictions." He also asked the court to order a new presentence report correcting the "demonstrably false information" about his prior conviction.[2]

¶3 In ruling on Leon's petition, the trial court acknowledged that an error had been made in characterizing the prior conviction, and the court ordered a corrected

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[1]To the extent Leon raises additional arguments for the first time in his petition for review, we do not consider them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that "have obviously never been presented to the trial court for its consideration").

[2]In his petition for review, Leon suggests the presentence report made an "official sentencing recommendation," based in part on its erroneous characterization of his prior conviction as a felony. However, he does not cite any such recommendation, and we do not find one in the report. Moreover, the report's only allusion to Leon's criminal history in its overall evaluation of the case was in his favor: a comment that "[t]he seriousness of the offense in which two human beings died unnecessarily [wa]s only partially offset by the absence of any known prior violent behavior."

presentence report to prevent the error from affecting Leon's prison classification and release eligibility. However, the court summarily dismissed Leon's petition, stating that, even had it known the prior conviction had been designated a misdemeanor, it "still would have found [Leon]'s 'criminal record' to be an aggravating factor" and "would have weighed the aggravating and mitigating factors in the same manner." It therefore found the error "would not have changed the 'sentencing calculus'" pursuant to *State v. Lehr*, 205 Ariz. 107, ¶ 8, 67 P.3d 703, 705 (2003), and *State v. Pena*, 209 Ariz. 503, ¶ 23, 104 P.3d 873, 879 (App. 2005). Having thus found no prejudice, the court denied Leon's request for a new sentencing hearing.

¶4 In his petition for review, Leon argues the court erred in summarily denying his request for resentencing. We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Summary dismissal of a Rule 32 petition is appropriate if, after reviewing the petition, the trial court determines that "no . . . claim presents a material issue of fact or law which would entitle the [petitioner] to relief." Ariz. R. Crim. P. 32.6(c).

¶5 Leon primarily argues the trial court misinterpreted *Lehr* and *Pena*. Specifically, he asserts those cases mandate a new sentencing hearing when it is unclear, based solely on the record of the prior sentencing proceeding, whether the court would have imposed the same sentences had it not been presented with false or misleading information. Although we must remand for resentencing when we cannot be certain the trial court would have imposed the same sentences in the absence of erroneous information, *see Pena*, 209

Ariz. 503, ¶ 24, 104 P.3d at 879, our review in this case is not limited to the prior sentencing hearing. Unlike *Lehr* and *Pena*, which were both direct appeals, the record available to us includes the post-conviction ruling by the sentencing court, after reconsidering the propriety of its sentences in light of the new information, stating clearly that it would have imposed the same sentences in any event.[3]

¶6 Furthermore, the record of the sentencing hearing supports the trial court's later finding that the erroneous information did not affect Leon's sentences. At the sentencing hearing, the court stated:

> In aggravation I considered the defendant's record with the law . . . a conviction in 1992, felony conviction, for marijuana possession . . . misdemeanor convictions, 2002 for possessing drug paraphernalia, and 2003 for driving under the influence, and perhaps most significantly, 2004 for carrying a concealed weapon.
>
> I have considered the obvious, the emotional impact of the defendant's behavior and the results that behavior has had on a lot of people. I considered the . . . risk of harm that existed for other people beyond the two that . . . lost their lives.

This statement supports the court's later findings in denying post-conviction relief that "the marijuana conviction at issue was only a subpart of one aggravating factor" and that its

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[3]Leon also argues that, because we cannot predict how defense counsel and victim witnesses might behave at a new sentencing hearing, we cannot be certain that the court would, in fact, impose the same sentences. However, we are required only to consider whether the mischaracterization of his prior conviction actually affected his sentences, not to speculate about how other variables might affect the outcome of a new hearing. *See State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985) (to set aside sentence, defendant must prove information presented to trial court was false or misleading and court relied on false information in sentencing).

erroneous designation as a felony did not alter the overall aggravating effect of Leon's criminal record. And this is "not a case in which the felony-misdemeanor classification question resulted in a mandatory enhancement of [the] sentence." *State v. Dogan*, 150 Ariz. 595, 602, 724 P.2d 1264, 1271 (App. 1986).

¶7 Under these circumstances, Leon has failed to "demonstrate that false information formed part of the basis for the sentence." *State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985). Furthermore, nothing in the record suggests the trial court, in confirming the propriety of the sentence, acted arbitrarily, capriciously, or without adequately considering the relevant facts. *See State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996). Because Leon suffered no prejudice, we find no merit to his claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to succeed on ineffective assistance claim, defendant must show prejudice). The trial court therefore did not abuse its discretion in summarily dismissing the petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.6(c).

¶8 For the reasons stated, although we grant Leon's petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge